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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
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12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JUAN MORALES-MORAN,

16 Defendant.  
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) Cr. No. 12-4444GT  
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) **ORDER**  
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18 On January 28, 2013, Defendant, Juan Morales-Moran ("Mr. Morales") filed two Objections  
19 to the Presentence Report ("PSR"). The Court filed a written order granting in part and denying  
20 part the two Objections. After listening to oral argument, the Court requested further briefing on  
21 the issue of whether or not Mr. Morales' prior 2003 deportation, and likewise the 2012  
22 reinstatement, are valid. For the reasons stated below, the Court finds that the two prior  
23 deportations are valid.

24 As a preliminary matter, Mr. Morales is correct in asserting that he may collaterally attack  
25 his prior deportations because they support a sentencing enhancement. *See United States v.*  
26 *Rodriguez-Ocampo*, 664 F.3d 1275, 1278 (9<sup>th</sup> Cir. 2011). To successfully collaterally attack his  
27 prior deportations, Mr. Morales must demonstrate that he: 1) exhausted any administrative  
28 remedies that may have been available to seek relief; 2) the deportation proceedings improperly

1 denied him the opportunity for judicial review; and 3) the order was fundamentally unfair. 8 U.S.C.  
2 § 1326(d), United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9<sup>th</sup> Cir. 2004; United States v.  
3 Reyes-Bonilla, 671 F.3d 1036, 1042-1043 (th Cir. 2012). The underlying removal order is  
4 “fundamentally unfair” if a defendant’s due process rights were violated by defects in the  
5 deportation process, and he suffered prejudice as a result. Reyes-Bonilla, 671 F.3d at 1043. To  
6 demonstrate prejudice, Mr. Morales must show that he had a “plausible” ground for relief from  
7 deportation. Ubaldo-Figueroa, 364 F.3d at 1050. It is the third prong, whether or not the removal  
8 order was “fundamentally unfair,” which is at issue in this case.

9 Mr. Morales argues that his due process rights were violated because he “was placed in  
10 administrative removal proceedings as an aggravated felon on the basis of a conviction for Cal.  
11 Penal Code § 11352.” Mr. Morales states that § 11352 has been ruled as categorically overbroad  
12 as a drug trafficking offense and “the government did not prove that his conviction was an  
13 aggravated felony under the modified categorical approach.” Hence, according to Mr. Morales, he  
14 should not have been placed in administrative proceedings and was not deportable as charged. As  
15 such, his deportation is invalid.” The Court disagrees.

16 Mr. Morales is correct in stating that the Ninth Circuit has ruled that § 11352 is overbroad  
17 as a drug trafficking offense. In United States v. Kovas, 367 F.3d 1116, 1119 (9<sup>th</sup> Cir. 2004), the  
18 Ninth Circuit did rule that § 11352 was overbroad and not categorically a drug trafficking offense.  
19 However, Kovas was decided in May of 2004. Mr. Morales was deported in May of 2003. Hence,  
20 at the time Mr. Morales was deported, under the law at that time, § 11352 was still considered a  
21 drug trafficking offense and an aggravated felony. Accordingly, under the law at the time Mr.  
22 Morales was deported, his deportation was valid.

23 Mr. Morales points out that the Ninth Circuit ruled in 2001 that Cal. Penal Code § 11360 was  
24 overbroad and not categorically a drug trafficking offense. See United States v. Rivera-Sanchez,  
25 247 F.3d 905, 908-09 (9<sup>th</sup> Cir. 2001). Mr. Morales argues that since the language of § 11360 and  
26 § 11352 were similar, that § 11352 was automatically overbroad under the law as well. Mr.  
27 Morales claims that INS and the Government should have applied the modified categorical  
28 approach to prove that Mr. Morales’ conviction for § 11352 was a drug trafficking offense.

1 However, this would require INS and the Government to have foreseen the subsequent change in  
2 the law. This Court declines to impose such a requirement. Notably, there is no argument before  
3 the Court as to whether this later change in the law was a “substantive interpretation” of the law  
4 are simply a clarification.

5 More importantly, as a matter of policy, to allow defendants to attack old deportations based  
6 upon all subsequent changes in the law would open a “flood gate of litigation” and render the  
7 finality of both those old deportations and any convictions which rely on those deportations  
8 uncertain. This would seriously undermine the finality of these judgments.

9 Moreover, even if Mr. Morales’ conviction for § 11352 was not an aggravated felony, he  
10 must still demonstrate prejudice, that he had a “plausible” ground for relief from deportation. In  
11 this case, Mr. Morales could have been deported simply because he was in the United States  
12 illegally and/or under 8 U.S.C. § 1227(a)(2)(B)(I) for his two prior drug related convictions. *See*  
13 Mielewczyk v. Holder, 575 F.3d 992, 997-98 (9<sup>th</sup> Cir. 2009).

14 Mr. Morales argues that he had a plausible ground for the relief of voluntary departure under  
15 8 U.S.C. § 1229c(a)(1) When considering granting a request for voluntary departure, an  
16 Immigration Judge must weigh both favorable and unfavorable factors. Campos-Granillo v. INS,  
17 12 F.3d 849, 852 (9<sup>th</sup> Cir. 1994)(*quoting* De La Luz v. INS, 713 F.2d 545 (9<sup>th</sup> Cir. 1983). One of  
18 the unfavorable factors is the “existence, seriousness, and recency of any criminal record.” *Id.* *See*,  
19 *e.g.* United States v. Zavala-Zavala, No. 11-5782, 2012 WL 1969289, at \*4 (S.D. Cal. June 1,  
20 2012). Additionally, Mr. Morales’ immigration records show that he was apprehended on six prior  
21 occasions and not prosecuted. *See, In re Arguellos-Campos*, 22 I. & N. Dec. 811, 819 (BIA 1999)  
22 (affirming denial of voluntary departure where alien had no criminal record, but had illegally  
23 entered the United States multiple times) Given the seriousness and the recency of his two prior  
24 drug related offenses and his prior apprehensions, it is not plausible that an immigration judge  
25 would have granted him voluntary departure. Because Mr. Morales has not shown plausible  
26 grounds for relief, he was not prejudiced by any alleged due process violation. Accordingly,

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**IT IS ORDERED** that Mr. Morales' 2003 deportation and subsequent 2012 reinstatement are valid.

**IT IS FURTHER ORDERED** that the +2 under § 2L2.2(b)(1) is applicable.

**IT IS SO ORDERED.**

date

  
GORDON THOMPSON, JR.  
United States District Judge

cc: All counsel and parties without counsel